

FILED

FEB 1 1978

MICHAEL RODAR, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

**COUNTY OF SUFFOLK AND CONCERNED CITIZENS OF
MONTAUK, INC., PETITIONERS**

v.

SECRETARY OF THE INTERIOR, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**BRIEF FOR THE SECRETARY OF THE INTERIOR
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

JACQUES B. GELIN,

JOHN J. ZIMMERMAN,

Attorneys,

Department of Justice,

Washington, D.C. 20530.

DAVID G. TRAGER,
United States Attorney,

J. CHRISTOPHER JENSEN,
Assistant United States Attorney,
Brooklyn, New York 11201,

LAWRENCE R. HOESE,
Attorney,
Department of the Interior,
Washington, D.C. 20240.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	13

CITATIONS

Cases:

<i>Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)</i> , 422 U.S. 289	8
<i>Coalition for Responsible Regional Development v. Coleman</i> , 555 F. 2d 398	8
<i>Chelsea Neighborhood Associations v. United States Postal Service</i> , 516 F. 2d 378	9
<i>Concerned About Trident v. Rumsfeld</i> , 555 F. 2d 817	8
<i>Daly v. Volpe</i> , 514 F. 2d 1106	9
<i>Environmental Defense Fund v. Tennessee Valley Authority</i> , 492 F. 2d 466	8
<i>Gulf Oil Corp. v. Morton</i> , 493 F. 2d 141	12
<i>Kelley v. Southern Pacific Co.</i> , 419 U.S. 318	8
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390	8, 12
<i>Manygoats v. Kleppe</i> , 558 F. 2d 556	8

Cases—(continued):

<i>New York v. Kleppe</i> , 429 U.S. 1307	4, 8
<i>People of State of Cal. ex rel. Younger v. Morton</i> , 404 F. Supp. 26, appeal pending, C.A. 9, No. 76-1431	2, 6-7
<i>Sierra Club v. Morton</i> , 510 F. 2d 813	6, 8, 9, 10, 11, 12
<i>Southern California Association of Governments v. Kleppe</i> , 413 F. Supp. 563	7
<i>State of Alaska v. Kleppe</i> , 9 E.R.C. 1497, appeal pending, C.A. D.C., No. 76-1829	7
<i>Trout Unlimited v. Morton</i> , 509 F. 2d 1276	8
<i>Union Oil Company of California v. Morton</i> , 512 F. 2d 743	12
<i>United States v. General Motors</i> , 384 U.S. 127	8, 9
<i>United States v. Parke, Davis & Co.</i> , 362 U.S. 29	8
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364	9

Statutes, rule and regulation:

Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i>	12
Coastal Zone Management Act Amendments of 1976, Section 307(c)(3), 90 Stat. 1018, 16 U.S.C. (Supp. V) 1456(c)(3)	10
National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 <i>et seq.</i>	3

Statutes, rule and regulation—(continued):

Outer Continental Shelf Lands Act of 1953, 67 Stat. 462 43 U.S.C. 1331	2
43 U.S.C. 1337(a)	4
Rule 52(a), Fed. R. Civ. P.	7, 9
30 C.F.R. 250.34	11

Miscellaneous:

13 Weekly Comp. of Pres. Doc. (January 10, 1977 and May 30, 1977)	6
13 Weekly Comp. of Pres. Doc. (August 1 and 8, 1977)	6

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-685

COUNTY OF SUFFOLK AND CONCERNED CITIZENS OF
MONTAUK, INC., PETITIONERS

v.

SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**BRIEF FOR THE SECRETARY OF THE INTERIOR
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A45) is reported at 562 F. 2d 1368. The opinion of the district court (Pet. App. A47-A123) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A124-A125) was entered on August 25, 1977. The petition for a writ of certiorari was filed on November 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the environmental impact statement prepared by the Secretary of the Interior in connection with Outer Continental Shelf Lease Sale 40 was adequate.

STATEMENT

On June 30, 1976, the Secretary of the Interior announced his decision to conduct a sale of oil and gas leases for an area of submerged lands on the outer continental shelf off the coast of New Jersey (OCS Lease Sale 40), pursuant to authority granted him by the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U.S.C. 1331 (Pet. App. A8). This decision, which involved the first substantial oil and gas leasing by the federal government in the Atlantic Ocean, constituted a major step in the accelerated OCS leasing program that had been adopted by the Secretary in September 1975 (Pet. App. A6).¹ That program, in turn, was a central element of a Presidential policy of increasing domestic energy supply and minimizing reliance on foreign energy sources that had been announced in January 1974 in response to the energy crisis precipitated by the Arab oil embargo of 1973 (*ibid.*).

In February 1975, well before the Secretary reached his final decision on OCS Lease Sale 40, petitioners had commenced an action to enjoin the proposed sale on numerous grounds. That action was subsequently consolidated with an action filed by the Natural Resources Defense Council, the State of New York, and others, after

¹The decision to accelerate and the environmental impact statement that accompanied it were upheld in *People of State of Cal. ex rel. Younger v. Morton*, 404 F. Supp. 26 (C.D. Cal.), appeal pending, C.A. 9, No. 76-1431.

the decision to hold this lease sale (Pet. App. A8). Plaintiffs in both cases sought injunctive relief on the ground that the Secretary had not complied with the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, in the 2700-page environmental impact statement on the accelerated leasing program ("Programmatic EIS") and the 2000-page environmental impact statement for Lease Sale 40 itself ("Sale 40 EIS").

Petitioners moved for a preliminary injunction against the holding of Lease Sale 40, which was scheduled for August 17, 1976, and an 11-day evidentiary hearing on the motion was held in the district court in July and August 1976. On August 13, 1976, the district court granted a preliminary injunction against Lease Sale 40 on the ground that the Sale 40 EIS was insufficient in one respect. The court found that the Secretary had given inadequate consideration to the possibility that oil developed in the sale area would ultimately have to be transported ashore by tankers rather than by pipelines, as the result of a possible refusal by state and local governments to allow the landing of pipelines on their shores (Pet. App. A8-A9).

Respondents immediately applied to the Court of Appeals for the Second Circuit for a stay of the preliminary injunction. On August 16, 1976, after argument, that court granted the stay, finding in a written decision that petitioners had failed to establish that they would suffer irreparable harm from Lease Sale 40, and that the national interest in obtaining energy independence would be damaged if the sale were aborted (Pet. App. A9).

The next day, the day set for the lease sale, petitioners applied to Mr. Justice Marshall, as Circuit Justice, for an order vacating the stay entered by the court of appeals and reinstating the preliminary injunction against the sale. Mr. Justice Marshall refused to grant petitioners' application, and the sale was held that day immediately following announcement of his decision (Pet. App. A9).²

At the sale, the Secretary of the Interior offered for leasing 154 tracts of submerged lands in the Baltimore Canyon area of the Mid-Atlantic. He received cash bonus bids exceeding 3.5 billion dollars on 101 of those tracts. Leases were finally executed with the successful high bidders on 93 of those tracts, and 1.128 billion dollars was paid to the Treasury by the lessees (Pet. App. A9). In addition, the lessees must pay rentals prior to discovery and a royalty of 16-2/3 percent—or, for some promising tracts, 33-1/3 percent—of the value of any oil and gas removed from the leased tracts (43 U.S.C. 1337(a)).

After the sale, the parties briefed and argued the appeal from the district court's decision granting the preliminary injunction, and on October 14, 1976, a second panel of the court of appeals reversed. It held that petitioners had not established irreparable injury from the lease sale and that, on the full record, petitioners had not demonstrated sufficient probability of succeeding on their NEPA claims (Pet. App. A9).

The suit came to trial in the district court in January 1977. The remaining plaintiffs,³ including petitioners,

²Mr. Justice Marshall's decision is reported *New York v. Kleppe*, 429 U.S. 1307.

³After the final reversal of the preliminary injunction, New York State withdrew from the action. Of the original eleven plaintiffs below, only two have now petitioned this Court for a writ of certiorari.

introduced *de novo* testimony on the attitudes of local communities toward possible onshore development relating to OCS leasing and on the accuracy of some economic analyses contained in a decision memorandum that had been submitted to the Secretary with respect to Lease Sale 40 (the Program Decision Option Document for Lease Sale 40, hereinafter "PDOD"). On February 17, 1977, the district court issued its final decision (Pet. App. A47-A123). The court declared the leases null and void and enjoined any exercise of the rights they purportedly granted (*id.* at A123). The court based its decision principally on the ground—similar to the one it had relied on for the preliminary injunction—that the Sale 40 EIS was inadequate because it failed to project pipeline routes ashore and then to consider the acceptability of those routes to state and local governments, their environmental impacts, and the ultimate feasibility of pipelining as an alternative to tankering (Pet. App. A79). The court also found, among other things, that the economic analysis in the PDOD was incorrect and that, as a result, the Secretary had conducted a defective "cost-benefit" analysis of the lease sale (Pet. App. A96-A97).

On appeal, a third panel of the court of appeals again reversed (Pet. App. A1-A45). The court held that the district court, in assessing the adequacy of the Secretary's environmental impact statement for Lease Sale 40, had consistently engaged in an impermissible weighing of the evidence *de novo* and had not applied the correct "rule of reason" standard. Specifically, the court concluded that the impact statement's discussion of the environmental impacts of future modes of transporting ashore any oil and gas from tracts within the lease area was adequate, in view of the speculative nature of the inquiry and in view

of the Secretary's continuing regulatory authority over the activities of the offshore lessees (Pet. App. A26-A27). The court also determined that the Secretary's cost-benefit analysis was adequate and that the district court had improperly substituted its judgment for that of the Secretary with respect to expert testimony adduced for the first time at trial (*id.* at A35). On issues not pursued here by petitioners, the court rejected, as unsubstantiated by the record and based on a misconception of the OCS leasing process, the district court's conclusions that the Secretary should have analyzed alternative methods of selecting and leasing tracts and that the Secretary had acted in "bad faith" (*id.* at A38-A43).

ARGUMENT

Although development of this nation's oil and gas resources located under the outer continental shelf is both important and controversial,⁴ this case presents no issue requiring further review by this Court. The decision of the court of appeals is correct and involves neither an issue of general legal importance, nor one on which the circuits are divided. To the contrary, the decision is entirely consistent with recent decisions of other federal courts rejecting similar challenges to environmental impact statements prepared by the Secretary of the Interior with respect to comparable OCS lease sales. *Sierra Club v. Morton*, 510 F. 2d 813 (C.A. 5); *People of State of Cal. ex rel. Younger v. Morton*, 404 F. Supp. 26 (C.D. Cal.),

⁴Both Presidents Ford and Carter, in addresses to Congress, have stressed the importance of OCS development, consistent with appropriate safeguards for the environment. 13 Weekly Comp. of Pres. Doc. 8, 9, 782, 786-787 (January 10, 1977 and May 30, 1977). President Carter specifically favors a rapid increase in OCS oil and gas development along the eastern seaboard. 13 Weekly Comp. of Pres. Doc. 1088, 1090, 1141, 1144 (August 1 and 8, 1977).

appeal pending, C.A. 9, No. 76-1431; *Southern California Association of Governments v. Kleppe*, 413 F. Supp. 563 (D. D.C.); *State of Alaska v. Kleppe*, unofficially reported at 9 E.R.C. 1497 (D.D.C.), appeal pending, C.A. D.C., No. 76-1829.

1. Petitioners' principal contention (Pet. 19-21) is that the court of appeals, in reviewing the factual findings of the district court, improperly refused to apply the "clearly erroneous" standard mandated by Rule 52(a), Fed. R. Civ. P., and substituted a more flexible "rule of reason" standard. This contention is incorrect.

Rule 52(a) applies by its terms to "findings of fact" and specifies that they "shall not be set aside unless clearly erroneous." In the present case, contrary to petitioners' suggestion, the Second Circuit expressly acknowledged the Rule 52(a) standard (Pet. App. A10-A11)⁵ and applied it to the factual determinations of the district court. Quite properly, however, the court of appeals at the same time recognized (Pet. App. A11) that review of the primary question of law in this case was subject to a different and "less restrictive" standard (Pet. App. A12):

Such a determination [whether an EIS complies with NEPA], although it may be labelled a "finding" by the district court, is not strictly a finding of fact but rather an exercise in judgment as to what is reasonable under given circumstances * * *. Although the district judge's evidentiary findings may remain undisturbed, it is our duty to insure that the

⁵The court stated (Pet. App. A10-A11):

To the extent that Judge Weinstein's findings resolve any disputed issues of evidentiary fact we are, of course, governed by the mandate of Rule 52(a), F[ed.] R. Civ. P., that they "shall not be set aside unless clearly erroneous."

district court has properly applied the rule of reason in judging the adequacy of an impact statement * * *.^[6]

The distinction drawn by the court of appeals between review of factual findings and review of legal conclusions is consistent with decisions of this Court. See, e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323; *United States v. General Motors*, 384 U.S. 127, 141, n. 16; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44.⁷ In *General Motors*, for example, the Court stated: "[T]he ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the 'clearly erroneous' test embodied in Rule 52(a) of the Federal Rules of Civil Procedure. * * * [T]he question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of the case" (384 U.S. at 141, n. 16). Here, the court of

⁶The "rule of reason" standard has been recognized as the appropriate standard for judicial review of the adequacy of an EIS under NEPA. *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21; *New York v. Kleppe*, 429 U.S. 1307, 1311 (Marshall, J., denying application to vacate stay pending appeal on the preliminary injunction in this case); *Manygoats v. Kleppe*, 558 F. 2d 556, 559-560 (C.A. 10); *Coalition for Responsible Regional Development v. Coleman*, 555 F. 2d 398, 400 (C.A. 4); *Concerned About Trident v. Rumsfeld*, 555 F. 2d 817, 827 (C.A. D.C.); *Sierra Club v. Morton (MAFLA)*, 510 F. 2d 813, 819 (C.A. 5); *Trout Unlimited v. Morton*, 509 F. 2d 1276, 1283 (C.A. 9); *Environmental Defense Fund v. Tennessee Valley Authority*, 492 F. 2d 466, 468, n. 1 (C.A. 6).

⁷This Court appears to have implicitly recognized the distinction in validating the environmental impact statement in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 327, the only case in which this Court has reviewed the legal sufficiency of a particular environmental impact statement.

appeals, applying the rule-of-reason standard to the facts of this case, similarly decided that the EIS prepared by the Secretary was sufficient to satisfy the requirements of NEPA. That determination did no violence to Rule 52(a).⁸

2. Petitioners also contend (Pet. 21-23) that the court of appeals erroneously set aside factual findings by the district court regarding the adequacy of the Secretary's cost-benefit analysis. We submit that the court of appeals, after careful examination of the material before the Secretary and the evidence taken by the district court *de novo*, correctly held that the evidence "fell far short of demonstrating that the Department of Interior's cost-benefit comparison was unfounded or that it ignored any data" (Pet. App. A33). Although the district court here appears to be the only federal court to deem such microscopic examination of a cost-benefit analysis to be a proper judicial function under NEPA,⁹ the court of

⁸Indeed, it is arguable that even insofar as factual determinations were involved, the court of appeals could have applied the clearly erroneous standard with less than its customary rigor because the record here consists largely of reports and papers, which an appellate court may be in as good a position to weigh as a trial court. See, e.g., *United States v. General Motors*, *supra*, 384 U.S. at 141, n. 16; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-396.

⁹The notion that NEPA mandates a precise quantification of project costs and benefits has been universally rejected by the federal courts. See, e.g., *Chelsea Neighborhood Associations v. United States Postal Service*, 516 F. 2d 378, 386-387 (C.A. 2); *Daly v. Volpe*, 514 F. 2d 1106, 1111-1112 (C.A. 9); *Sierra Club v. Morton (MAFLA)*, *supra*, 510 F. 2d at 827. The presentation of projected production amounts and schedules and of anticipated capital costs to be borne by successful bidders was incorporated in the PDOD not for the purpose of compliance with NEPA, but so that the Secretary could assure himself that the expected returns to bidders would be sufficient to insure a competitive sale. Analysis of the environmental costs and benefits was adequately presented in the environmental impact statement, which the Secretary also considered as part of his decision making process (JA 3501).

appeals thoroughly scrutinized the evidence relied on by the district court (Pet. App. A33-A35) and found that it failed to establish the asserted deficiency of the Secretary's analysis. Instead, it established that the district judge, "[i]n crediting [the plaintiffs' economic expert's] conclusions over those of the Department's experts, * * * substituted the court's judgment for that of the Department and its experts, exceeding the proper scope of judicial review" (Pet. App. A35). In any event, since this issue involves only the differing views of the courts below on a fact-intensive record, it presents no question warranting review by this Court.

3. Petitioners further contend (Pet. 24-27) that the court of appeals improperly found the Sale 40 project "environmentally divisible" for the purposes of determining the adequacy of its EIS, and that this conclusion conflicts with the conclusions reached by other courts of appeals in similar cases.

The decision of the court of appeals on this issue is, however, both correct and consistent with other decisions. See *Sierra Club v. Morton (MAFLA)*, *supra*, 510 F. 2d at 813. As the court of appeals noted (Pet. App. A16-A17, A23), the Secretary has announced that he will require preparation of another EIS, directed explicitly at production and development, before he grants approval of any production plans in the Sale 40 area.¹⁰ Further, as the court also recognized (Pet. App. A23), development decisions by the Secretary will occur only after the affected Atlantic Coast States have been protected by the provisions of Section 307(c)(3) of the Coastal Zone Management Act Amendments of 1976, 90 Stat. 1018-

¹⁰Such plan approval is required by regulations as a prerequisite to development under the leases (30 C.F.R. 250.34).

1019, 16 U.S.C. (Supp. V) 1456(c)(3), under which the States prepare, in coordination with the federal government, coastal zone programs to which offshore lessees must adhere. In addition, the court properly considered that, at the time the sale was scheduled, the area encompassed by the offered tracts was so large (over 875,000 acres), and the existence and location of oil and gas resources within it so speculative, that meaningful prediction about transport methods and ultimate destinations was impossible (Pet. App. A19). The court of appeals thus reasonably concluded that the Lease Sale 40 EIS need not specify particular pipeline routes or predict the impact of future state and local land use controls on such routes; "[i]n effect the procedure would amount to a meaningless exercise * * *" (Pet. App. A19).

Moreover, the Secretary retains control over all phases of the OCS project. As the court of appeals recognized, sale of the leases does not preclude the Secretary from altering future stages of the project so that pipelining can occur only in an environmentally acceptable manner (Pet. App. A22-A23). The Fifth Circuit reached the same conclusion in *Sierra Club v. Morton (MAFLA)*, *supra*, 510 F. 2d at 524. Although petitioners assert (Pet. 24-27) that the powers of the Secretary under the leases are so limited that he must anticipate the full breadth of environmental consequences of every stage of the project before selling the leases, the assertion misstates the contractual relationship that exists between the Secretary and Lease Sale 40 lessees (Pet. App. A25-A26). In every OCS project the Secretary retains the power to modify potential pipeline routes, or disapprove such routes, as well as the authority to suspend operations until an acceptable transport mechanism is presented. The Fifth and Ninth Circuits are in agreement with the Second Circuit on this

proposition. See *Sierra Club v. Morton (MALFA)*, *supra*; *Union Oil Company of California v. Morton*, 512 F. 2d 743, 749-750 (C.A. 9); *Gulf Oil Corp. v. Morton*, 493 F. 2d 141, 146-148 (C.A. 9).¹¹

4. Finally, petitioners assert (Pet. 23-24) that this Court should review the court of appeals' decision because it presents questions similar to those before the Court in *Natural Resources Defense Council, Inc. v. Vermont Yankee Nuclear Power Corporation*, No. 76-419, argued November 28, 1977. The central questions in that case, however, are not similar to those presented here. That case involves a challenge to certain rulemaking procedures of the Nuclear Regulatory Commission and a claim of interested parties to the opportunity to present their views in the manner they believe to be required by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* This case involves no rulemaking action, and petitioners were given a full opportunity to present their views to the Secretary of the Interior, as well as having full discovery in the district court litigation and the opportunity to present extensive evidence *de novo* in the district court.

¹¹The Secretary's logical division of the OCS process into several decisional stages is also consistent with this Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 390. As in the case of federal coal leasing in the Northern Great Plains, it is not arbitrary for the Secretary here, in exercising his discretion, to tailor a particular EIS to the particular proposal for action. See 427 U.S. at 402 and n. 14, 412-415 and n. 26. A generic rather than a site-specific analysis of post-development transport questions, which this lease sale EIS adequately contains (Pet. App. A15-A17), makes "appropriate allowances for the inexactness of all predictive ventures" (427 U.S. at 402, n. 14), and does not commit the Secretary to approve a development or production plan in advance. 427 U.S. at 414, n. 26; *Sierra Club v. Morton (MAFLA)*, *supra*, 510 F. 2d at 824.

There is no reason to consider this case in connection with *National Resources Defense Council*, much less to grant plenary review of this case because that one is pending.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

JACQUES B. GELIN,
JOHN J. ZIMMERMAN,
Attorneys.

DAVID G. TRAGER,
United States Attorney,

J. CHRISTOPHER JENSEN,
Assistant United States Attorney,

LAWRENCE R. HOESE,
Attorney,
Department of the Interior.

JANUARY 1978.